Gan Boon Kyee v Yap Hong Sin & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-1-95
GOPAL SRI RAM, ABU MANSOR AND DENIS ONG JJCA
13 MAY 1997

Civil Procedure *— Time — Extension of time — Application for — Delay in application — Discretion of court — Whether discretion exercised erroneously*

The respondents took out an originating summons for a declaration against the appellant and other defendants, which was fixed for hearing on 5 May 1993. It had been served on the appellant and the other defendants, all of whom had entered appearance and filed affidavits. The appellant and his counsel were absent at the hearing. Arguments for and against the application were heard from counsel for the respondents as well as counsel for the third and fourth defendants and the affidavits filed were read. The judicial commissioner granted the relief sought by the respondents. The appellant did nothing until 24 March 1994 when he applied to the court to extend time to make an application for extension of time and for a stay of the declaratory judgment. The judicial commissioner refused the extension sought. The appellant appealed, arguing that the judicial commisioner exercised her discretion erroneously.

Held, dismissing the appeal:

The learned judicial commissioner exercised her discretion correctly. She took into account all relevant considerations and directed herself correctly on the law. She asked herself the right question and her decision accorded with the justice of the case. The judicial commissioner was entirely correct in classifying the conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the court. It is axiomatic that the law assists the vigilant and not the indolent. Further, the court was entirely unconvinced with the arguments in support of this appeal. Therefore, the appeal was dismissed (see p 601D–F).

Per curiam:

The declaratory judgment was not the mechanical act of the learned judicial commissioner but a pronouncement made after consideration of the evidence and submissions. Therefore, the judicial commissioner was correct in her observation that this was not a judgment in default (see pp 600F and 601C).

[Bahasa Malaysia summary

Penentang-penentang telah mengambil satu saman pemula untuk perisytiharan terhadap perayu dan penentang-penentang lain, yang ditetapkan untuk pembicaraan pada 5 Mei 1993. Ia telah disampaikan kepada perayu dan penentang-penentang lain, yang mana kesemua

telah memasukkan kehadiran dan memfailkan afidavit-afidavit. Perayu dan peguamnya tidak hadir di pembicaraan. Hujah-hujah untuk dan terhadap permohonan didengar daripada peguam penentang-penentang serta peguam untuk defendan ketiga dan keempat dan afidavit-afidavit yang difailkan telah dibaca. Pesuruhjaya kehakiman memberikan relief yang dipohon oleh penentang-penentang. Perayu tidak berbuat apa-apa sehingga 24 Mac 1994 apabila dia memohon kepada mahkamah supaya masa dilanjutkan bagi memohon pelanjutan masa dan untuk penggantungan penghakiman perisytiharan. Pesuruhjaya kehakiman menolak pelanjutan yang diminta. Perayu membuat rayuan, dengan berhujah bahawa pesuruhjaya kehakiman telah salah melaksanakan budi bicara beliau.

Diputuskan, menolak rayuan:

Pesuruhjaya kehakiman yang arif telah melaksanakan budi bicara dengan betul. Beliau mengambil kira semua pertimbangan relevan dan mengarah diri dengan betul atas undang-undang. Beliau bertanya persoalan yang betul dan keputusannya adalah menurut keadilan kes. Pesuruhjaya kehakiman adalah betul sepenuhnya dalam mengklasifikasikan tindak-tanduk perayu ini sebagai 'senang-lenang' disebabkan kadar perlahan yang mana perayu memohon kepada mahkamah. Tidak dapat disangkal bahawa undang-undang membantu mereka yang sentiasa berjaga-jaga dan bukan yang berat tulang. Seterusnya, hujah-hujah yang menyokong rayuan ini tidak meyakinkan mahkamah pada keseluruhannya. Maka, rayuan ditolak (lihat ms 601D–F).

Per curiam:

Penghakiman perisytiharan tidak merupakan tindakan mekanikal pesuruhjaya kehakiman yang arif tetapi satu pengumuman yang dibuat selepas mempertimbangkan keterangan dan hujah-hujah. Oleh yang demikian, pesuruhjaya kehakiman adalah betul dalam pemerhatian beliau bahawa ini bukanlah suatu penghakiman ingkar (lihat ms 600F dan 601C).]

Notes

For cases extension of time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3570–3577.

Appeal from: Originating Summons No S2–24–174 of 1991 (High Court, Kuala Lumpur)

Charles Hector (*Wee Choo Keong & Faaiz*) for the appellant.
Yusuf Khan bin Ghows Khan (*Yusuf Lee Pathma & Marbeck*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment): The present appeal is by the first defendant in the court below against the refusal by the learned judicial commissioner to extend time to make an application for extension

of time and for a stay of a declaratory judgment entered on 5 May 1993. The appellant's summons initially carried a prayer to set aside the declaration in question. However, the summons was later amended and this prayer was deleted. What remained before the learned judicial commissioner was only the application for extension and stay.

The brief facts relevant to the appeal may be shortly stated.

On 16 October 1979, the second defendant in the court below as vendor and the respondents as purchasers entered into a sale and purchase agreement for the purchase of a house situated on the land held under EMR 5132 for Lot 1935 ('the property').

The appellant is the registered proprietor of the property. Apart from the house in question, there were six others which do not concern us in the present appeal. The basis upon which the sale and purchase was transacted was that the second defendant was beneficially entitled to the property under a trust deed dated 25 October 1979.

On 27 October 1992, the respondents took out an originating summons for a declaration that the defendants thereto held the property in trust for the respondents. The originating summons came on for hearing on 5 May 1993. It had been served before then on the appellant and the other defendants to the action all of whom had entered appearance. The parties had also filed and exchanged affidavits before the return date of the summons. However, on the matter being called, the appellant and his counsel were absent.

The judicial commissioner hearing the case granted the relief sought by the respondents in their summons. The order extracted from the court's registry reveals that arguments for and against the application were heard from counsel for the respondents as well as counsel for the third and fourth defendants and that the affidavits filed had been read. In other words, the order was not the mechanical act of the learned judicial commissioner but a pronouncement made after consideration of the evidence and submissions.

Returning now to the chronology, the appellant after becoming aware of the judgment on 14 October 1993, did nothing until 24 March 1994. The learned judicial commissioner has in her judgment alluded to the events that transpired between these two dates and the steps taken by the appellant in that time frame. I therefore do not propose to regurgitate the details as no useful purpose would be served by repetition.

On 24 March 1994, the appellant filed his application to which I have referred in the opening paragraph of this judgment. In the affidavit in support of his summons, he set out the explanation for the delay in making his application. The learned judicial commissioner, after considering the explanation proffered, rejected it and refused the extension sought.

Before us, En Hector, counsel for the appellant, has criticized the learned judicial commissioner's reasons and advanced a number of grounds in support of that criticism. They all may be summed up in one sentence. It is that the learned judicial commissioner exercised her discretion erroneously.

A I have read the judgment of the learned judicial commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by *Zamir & Woolf on The Declaratory Judgment* (2nd Ed) at p 264:

> ... courts will generally be reluctant to grant a declaration as part of a
B default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief.

As I earlier observed, the order dated 5 May 1993 makes it clear that the declaratory relief sought for in this case was not granted in default but after
C consideration of evidence and argument. I am therefore in agreement with the learned judicial commissioner in her observation that this was not a judgment in default.

Further, she was entirely correct in classifying the conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the court. It is axiomatic that the law assists the
D vigilant and not the indolent.

At the end of the day, it all boils down to whether the learned judicial commissioner exercised her discretion correctly. In my judgment, she did. She took into account all relevant considerations; she directed herself correctly on the law; she asked herself the right question, and her decision
E accords with the justice of the case.

I am entirely unconvinced with the arguments in support of this appeal. I would therefore dismiss the appeal with costs and affirm the order of the learned judicial commissioner. By consent of counsel before us, the costs of this appeal is fixed at RM1,000. The deposit paid into
F court by the appellant shall be paid out to the respondent to account of his fixed costs.

Abu Mansor JCA: I agree that this appeal should be dismissed for the reasons given by my learned brother.

G **Denis Ong JCA**: I concur.

Appeal dismissed.

Reported by Jafisah Jaafar

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